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THOMAS A. DEGISE, individually and in his official capacity as County Executive for the County of Hudson,
*Plaintiff*,

vs.

AMY TORRES, STACEY GREGG, KASON LITTLE, MARISA BUDNICK, ANAND SARWATE, JAKE EPHROS, BRYAN GUEVARA, HECTOR OSEGUERA, and JOHN DOES AND JANE ROES 1-20 (fictitious persons whose true identities are presently unknown),
*Defendants*.

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION: HUDSON COUNTY

DOCKET NO. HUD-C-179-20

CIVIL ACTION

**DEFENDANTS' SUMMATION**

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## INTRODUCTION

This action arose when Hudson County Executive Thomas DeGise and several County Commissioners sought to restrain individuals protesting the County's agreement with U.S. Immigration and Customs Enforcement ("ICE") to detain individuals at the county jail. The protests at issue occurred between December 3 and December 7, 2020, on public property outside the residence of Plaintiff DeGise at 402 New York Avenue, Jersey City, New Jersey. The Court entered a Temporary Restraining Order ("TRO") on December 8, 2020. Discovery and a four-day hearing in the matter followed. Although five Commissioners joined him in bringing the case, DeGise is the only remaining plaintiff. DeGise now asks to make the existing temporary restraints permanent. Defendants oppose that request. The restraints on Defendants' rights are unconstitutional; they violate Defendants' right of speech, right of assembly, and right to petition the Government – fundamental rights guaranteed by our state and federal constitutions. For the following reasons, the Court should dissolve the restraints, enter judgment for Defendants, and dismiss the matter in its entirety.

*First*, Plaintiff cannot meet the burden required to justify permanent restraints. DeGise does not need injunctive relief. Jersey City's legislators have already crafted neutral ordinances designed to protect residential privacy that provide sufficient protection for DeGise. Furthermore, DeGise has decided to terminate Hudson

County's participation in the ICE contract – the only subject of Defendants' protests. Plaintiff can therefore no longer claim that he faces ongoing harm.

*Second*, the restraints are unconstitutionally vague and overbroad. The TRO and the requested permanent injunction permit officials an impermissible level of enforcement discretion.

*Third*, based on the record before the Court, DeGise's objection to the protests and his motivation to seek injunctive relief rests primarily on the protestors' political views. The TRO is therefore a content-based prior restraint on speech and presumptively unconstitutional.

*Fourth,* even if the Court concludes that the restraints are content neutral, they burden far more speech than necessary to protect DeGise's legitimate interest in residential privacy, and therefore do not comport with the standards of *Murray v. Lawson*, 138 N.J. 206 (1994).

*Fifth*, the restraints do not leave ample alternative channels of communication for Defendants. In contrast to *Murray*, where the Court considered whether protestors could be seen and heard by their intended audience, the terms of the TRO and the requested permanent injunction fail to do so.

For all the reasons that follow, the Court should immediately dissolve the TRO, decline to issue a permanent injunction, and dismiss Plaintiff's claims as they

fail as a matter of fact and as a matter of law. For the Court's convenience, Defendants present enumerated findings of fact followed by legal analysis.

## PROCEDURAL HISTORY

On December 8, 2020, six Plaintiffs – Hudson County Executive Thomas DeGise and five Hudson County Commissioners – filed a Verified Complaint[1] and an Order to Show Cause seeking restrictions on protests outside each of their homes. The Court granted an *ex parte* TRO that same day that restricted protests by Defendants outside of the Plaintiffs' homes to one hour between 7 p.m. and 8 p.m. every two weeks, no closer than 200 feet from the property line or, as applied to DeGise, at a designated spot out of view from the DeGise residence on the corner of Congress Street and New York Avenue. (*See* Dec. 8, 2020 TRO, at 2–3 ¶¶ A-E.) The TRO also restricted protests to no more than ten people and required protestors to notify the local police department and the Hudson County Sheriff's Office at least twenty-four hours prior to the demonstration. (*See id.* at 3 ¶¶ F-G.) During a conference on December 22, 2020, the Court granted limited expedited discovery and set a return date that was later extended to May 14, 2021.

[1] Plaintiffs filed a First Amended Complaint on January 29, 2021. Plaintiffs then filed a Motion for Leave to File a Second Amended Complaint on April 12, 2021, for the purpose of naming three people arrested on December 8 (Bryan Guevara, Hector Oseguera, and Jake Ephros) as Defendants, which the Court granted on May 7, 2021, over the originally-named Defendants' opposition.

On April 26, 2021, Defendants Amy Torres, Stacey Gregg, Kason Little, Marisa Budnick, and Anand Sarwate[2] filed a brief in response to the Order to Show Cause and in support of Defendants' Motion to Dismiss and Motion to Dissolve Temporary Restraints ("Opposition Brief"). Defendants' motions accompanied the Opposition Brief.[3] Plaintiffs filed their response on May 10, 2021. Between June 9 and June 24, 2021, the Court held four days of testimony. During the hearing on June 9, 2021, the Court excluded evidence related to events that occurred on December 8, 2020, along with evidence relating to the vagueness of the TRO. Defendants objected to this evidentiary ruling during the hearing as well as through briefing filed on June 15, 2021. Following briefing by both parties, the Court declined to reconsider its ruling.

On June 24, 2021, shortly after former Plaintiff-Commissioner Romano testified, Defendants filed a subpoena seeking phone records referenced by Romano during his testimony. Plaintiffs filed a Motion to Quash, which the Court denied on August 5. On August 13, 2021, one business day before the court-ordered deadline

[2] At the time of filing the Opposition Brief, Plaintiffs had not yet sought to file a Second Amended Complaint to name Defendants Hector Oseguera, Bryan Guevara, and Jake Ephros. Accordingly, these three Defendants were not yet named, served, nor represented at the time of filing.

[3] Defendants acknowledge the unique procedural posture of this case in which, pursuant to their request, the Court ordered Defendants to contemporaneously file a motion to dismiss with their substantive response to the Court's Order to Show Cause, and as such the Court may treat the motion to dismiss as one for summary judgment pursuant to *R.* 4:6-2.

for Romano to produce his subpoenaed phone records, all five Plaintiff-Commissioners filed a Stipulation of Voluntary Dismissal, which Defendants did not oppose. The Court so-ordered this dismissal on August 20, 2021. DeGise – who is the only remaining Plaintiff in this case – filed his summation on September 15, 2021.

## FINDINGS OF FACT

### The ICE Contract

1. On November 24, 2020, the Hudson County Board of Commissioners (then referred to as Freeholders) presided over a public meeting that lasted more than 12 hours. (7T56:4-10; Pl 5.)[4] At issue was Resolution No. 718-11-2020 – a resolution to extend the intergovernmental contract between Hudson County and

[4] Transcript references are to the consecutive volumes of the transcript, as follows:

1T – December 22, 2020 Conference
2T – March 3, 2020 Motion Hearing
3T – April 20, 2021 Transcript of Decision
4T – May 7, 2021 Motion Hearing
5T – June 9, 2021 Transcript of Hearing
6T – June 16, 2021 Transcript of Hearing
7T – June 17, 2021 Transcript of Hearing
8T – June 24, 2021 Transcript of Hearing

Exhibits are referenced by number. "Pl" are Plaintiff's exhibits; "Dn" are Defendants' exhibits.

The parties have agreed to a Joint Statement of Undisputed Facts and a Supplemental Joint Statement of Undisputed Facts, which Defendants reference herein as "Stip. Facts" and "Supp. Stip. Facts," respectively.

ICE to continue incarcerating people on behalf of ICE at the county jail ("ICE contract"). (Stip. Facts, ¶ 1.) The resolution drew extensive public opposition (Pl 5); over 140 individuals gave public comment during the meeting. (7T56:11-14.)

2. Prior to the vote on November 24, Defendants urged Commissioners not to extend the ICE contract; Stacey Gregg, Kason Little, and Amy Torres were among the speakers at the November 24th Commissioners' meeting to speak in opposition to Resolution No. 718-11-2020 (Stip. Facts, ¶ 3; Pl 5, 198:11-201:15,17:5-19:5, 337:24-342:7), and Dr. Anand Sarwate emailed Commissioner Torres ahead of the November 24th hearing to express his opposition (Stip. Facts, ¶ 4). Hector Oseguera (Pl 5, 26:16-28:11) and Jake Ephros (Pl 5, 13:21-15:2) also spoke in opposition to the contract at the November 24th public meeting.

3. Despite extensive public opposition, the Board voted six-to-three to approve the contract. (Pl 5, 451:12-461:9.) Commissioners Anthony Vainieri, Anthony Romano, Albert Cifelli, Caridad Rodriguez, and Kenneth Kopacz all voted in favor of the resolution extending the contract. (Stip. Facts, ¶ 2.) These Commissioners were all plaintiffs in this matter at the time of filing (Compl.), and remained plaintiffs throughout the proceedings until the Court granted their voluntary stipulation of dismissal on August 20, 2021 (Aug. 20 Order). None of the Commissioners who voted against the contract have been party to this lawsuit.

4. Once the contract was ratified by the Commissioners at the November 24th meeting, only DeGise had the authority to cancel the ICE contract. (5T85:6-16; Pl 5, 430:14-20.)

5. DeGise does not attend Commissioners' meetings. (5T84:21-22; Pl 5, 198:3-5.)

6. After the Commissioners' vote on November 24, Defendants chose to direct their opposition to the ICE contract to DeGise because he was "[t]he sole person responsible for ending [the ICE contract]." (Torres Dep. Tr., 95:1–11.)

7. Protestors never demonstrated outside the residences of Commissioners Vainieri, Romano, Cifelli, Rodriguez, or Kopacz. (Stip. Facts, ¶ 14; 7T20:7-19.)

8. On September 10, DeGise sent a letter to ICE advising the agency that Hudson County "will no longer house or accept ICE detainees for housing." effective November 1, 2021.[5]

**The DeGise Residence and the Surrounding Neighborhood**

9. DeGise lives at 402 New York Avenue in Jersey City, New Jersey. (Stip. Facts, ¶ 7.) He lives in a two-story, two-family house on a "city lot" measuring

[5] *See* Declaration of Farrin Anello, Ex. 1. Admission of this letter is subject to Defendants' request to expand the record filed contemporaneously with this brief. *See* Defs.' Mot. to Expand the Record. In the alternative, Defendants request that, pursuant to *N.J.R.E.* 201(a), the Court take judicial notice of the determination by a county executive that Hudson County will no longer house people detained by ICE effective November 1, 2021.

25 by 100 feet. (Stip. Facts, ¶ 25.) Most of the lots on his block are the same size or smaller. (5T85:23-86:11.)

10. DeGise's street can be noisy. His residence is very close to Washington Park. (5T91:21-92:1.) People make noise walking by his house. (5T92:23-25.) Cars driving down his street play music "too loud." (5T93:2-4.) Garbage trucks make noise as they collect trash and throw down trash barrels (5T100:8-9), which occurs a little earlier than 9:30 or 10 p.m. (5T98:6-10). The garbage trucks "wake up the neighborhood," but that is something DeGise believes "you have to put up with" as a part of "life in the big city." (DeGise Dep. Tr., Dn 1, 70:9-20.)

11. DeGise lives in a neighborhood with both residential and commercial properties. On the corner of Congress Street and New York Avenue, around 125 feet from DeGise's house, there is a daycare business. (5T28:20-23, 29:3-6.) Five houses are located between 402 New York Avenue and the daycare business. (5T27:23-28:1.) "Catty-corner" to the daycare facility is a liquor store. (5T86:22-24.) There is a fire house across the street from the liquor store. (5T87:6-8.) Within a couple of blocks from the DeGise residence are a restaurant (5T89:12-15), a bar/restaurant (5T90:11-15), a coffee shop (5T90:20-23), and a couple of bodegas (5T90:24-91:1).

12. The daycare on the corner of Congress Street and New York Avenue is on the same side of the street as DeGise's residence. (5T82:14-16.) It is impossible

to see the corner of Congress Street and New York Avenue from inside the DeGise residence. (5T82:8-16.)

13. DeGise would not be able to hear activity on the corner of New York Avenue and Congress Street. (5T107:1-2; DeGise Dep. Tr., Dn 1, 188:12-14.)

**The ICE Protests**

14. Protests regarding the ICE contract occurred in front of 402 New York Avenue, Jersey City, New Jersey, on December 3, 4, 5, 6, and 7, 2020. (Stip. Facts, ¶ 8.)

15. Approximately ten to fifteen people were present at the protests each night. (Stip. Facts, ¶ 20; Dn 82A (reporting in an HCSO[6] comment sheet that there were twelve people present at 9:34 p.m. and that nine protestors remained at 9:42p.m. on December 5); Dn 83 (reporting in an HCSO comment sheet that there were ten to twelve protestors present at 9:07 p.m. on December 6).)

16. Some protestors wrote messages in washable chalk on the public sidewalk. (Stip. Facts, ¶ 21.) The chalk washed away. (DeGise Dep. Tr., Dn 1, 81:14-15.) On at least one occasion, officers with the HCSO cleared the chalk. (Dn 83 (reporting on an HCSO comment sheet at 11:10 p.m. that officers "CLEARED CHALK AND CHALK SPRAY AS POSSIBLE FOR THE NIGHT").)

[6] "HCSO" is the abbreviation for Hudson County Sheriff's Office.

17. DeGise never saw any protestors go on to his property. (DeGise Dep. Tr., Dn 1, 75:15-16). Although demonstrators may have stepped into the driveway of the DeGise residence briefly to let someone pass the protestors on the sidewalk, no one stood for a long period of time in the driveway. (8T123:17-124:4.)

18. Within five or ten minutes of when the protests started on December 3, DeGise called 9-1-1. (Stip. Facts, ¶ 17; 5T65:9-13.) He called the police after he "figure[d] out that it was the ICE protestors." (DeGise Dep. Tr., Dn 1, 47:4-9.)

19. DeGise was not afraid of the protestors. During his call to 9-1-1 on December 3, DeGise did not articulate any fear of the protestors. (Dn 67; 5T195:25-196:2.) Instead, he told the 9-1-1 operator that he was ignoring the protestors. (Dn 67; 5T198:5-8.)

20. On December 3, DeGise "d[id]n't fear for [his] life and everything." (5T65:2-3.)

21. DeGise stated that "[a]fter a day or two [he] had the feeling that [the protesters] would not get violent." (5T191:5-6.) He and his wife "talked about it and said these are not violent people." (5T61:8-10.) DeGise told his wife not to worry about the protestors. (5T47:10-11.) He thought that he and his wife would "be all right" so they watched television and worked on crossword puzzles during the protests. (5T47:12-14.)

22. DeGise and his wife sat on the couch during the protests. (5T44:13-15.) The couch is five or six feet from the living room's sliding glass doors that look out to New York Avenue. (5T45:17-46:6, 46:12-17.)

23. During the protests, DeGise peeked out from his blinds "three, four" times each night. (5T47:3-5.) He did not want the protestors to see him because he did not want to "engage in a conversation" with them. (5T46:21-23.)

24. On December 4-7, 2020, the protests began around or a little after 9 p.m. and the louder portion of the protests ended at exactly 10 p.m. (Stip. Facts, ¶ 26; 5T160:5-9; 8T125:25-126:3; DeGise Dep. Tr., Dn 1, 60:11-15.) The protesters coordinated this cut-off time to comply with the Jersey City municipal noise ordinance. (Stip. Facts, ¶ 26; Gregg Dep. Tr., 30:25-31:8, 47:11-12; Pl 37, 16:7-12.) At 10 p.m., the protesters held a quiet vigil that lasted from a few minutes to around thirty minutes. (Stip. Facts, ¶ 27; Dn 83 (entry at 10:28 p.m. on December 6 reading "SILENT VIGIL").) The protesters stayed mostly silent during the vigil aside from quietly talking amongst themselves. (8T126:4-13.)

25. The protestors never rang the doorbell to the DeGise residence. (5T108:11-13; 8T124:5-20.) The protestors were peaceful and non-violent. (5T67:18-20, 117:3-8, 120:21-121:24), and they never made any threats (5T121:3-5). They did not block traffic. (5T120:5-20.)

26. No tickets or citations were issued to people participating in the protests on December 3-7, 2020, and no arrests were made during the protests or vigils held on those dates. (Stip. Facts, ¶ 19; 8T73:21-74:2; 8T100:19-23; 8T126:14-19.)

27. HCSO officers described the protestors as "peaceful" in dispatch comment sheets and through radio or phone transmissions. (Dn 82A; Dn 69.) In conversations with Sheriff Schillari, HCSO officers described the situation outside the DeGise residence as "calm," and a "silent vigil" with "no noise." (Dn 43; 8T57:2-4; Dn 44; 8T57:17-21.)

28. HCSO officers at the protests were on the lookout for people shining lights into the DeGise residence, people going on to the DeGise property, and any safety concerns presented at the scene. (8T92:17-25.) The officers did not see any activity that rose to the level of a criminal offense. (8T99:19-22.)

29. On December 6, only one person shone a light into the DeGise residence; this person was told to stop and they immediately complied. (8T124:21-125:5.)

30. The lights that the protestors had with them were LED candles. (8T96:10-13.) The lights were like replicas of candles. (8T98:18-24.)

**Hudson County Sheriff's Office's Involvement**

31. DeGise contacted his chief of staff about the protests on the evening of December 3. (Stip. Facts, ¶ 18.) DeGise also involved Hudson County Sheriff Frank Schillari on the first night of protests. (5T64:23-25; DeGise Dep. Tr., Dn 1, 52:17-20, 54:8-12.)

32. DeGise spoke often with Sheriff Schillari about the protests. (DeGise Dep. Tr., Dn 1, 53:18-24; 8T48:2-11, 65:4-6.) The Sheriff received calls from DeGise "[a]t least once a night, sometimes twice" while the protests were ongoing. (8T65:4-6.) Such common contact between DeGise and Sheriff Schillari "isn't routine" but "was because of what was happening." (DeGise Dep. Tr., Dn 1, 54:3-7.)

33. DeGise and Sheriff Schillari have a personal relationship. (8T43:9-14.) Although the County Commissioners control the HCSO's budget, Sheriff Schillari believes the Commissioners consult with DeGise in making their budgetary decisions. (8T46:3-9.) Sheriff Schillari and DeGise both run on the County Democratic line, which is "a very powerful group" in Hudson County. (8T44:21-45:3.) When relationships among people associated with this line fray, people can lose their position on the line, losing a valuable political boost to their campaigns. (8T45:21-46:2.)

34. HCSO officers provided updates about the protests to Sheriff Schillari while they were occurring. (Dn 83 (reading at 9:10 p.m. on December 6 that "SO1 NOTIFIED," indicating that the Sheriff had been notified).) Sheriff Schillari also received calls about the protests from the County's lawyers. (8T65:8-10.) Sheriff Schillari "heard different stories" from different sources (8T50:20-24; Dn 69 (Lt. Rodriguez reporting that officers outside the residence stated the protestors were being "peaceful" and Sheriff Schillari reporting that DeGise called him and "they're not peaceful")): while Sheriff Schillari was informed by officers on the scene that the protests were under control and peaceful, DeGise told him that the protestors were not under control (8T61:24-62:12; Dn 69). When the information from HCSO officers and DeGise conflicted, Sheriff Schillari accepted the information reported by DeGise over the reports of law enforcement officers. (Dn 69 (Sheriff Schillari countering reports of peaceful protestors by stating that "they're not peaceful – the County Executive called me").)

35. Sheriff Schillari ordered HCSO officers to collect protestors' names (8T65:11-15), although he did not know whether he had the authority to demand names if the protestors were not breaking a law (8T70:1-3). He thought collecting the names would be "helpful" to check them against a list of professional agitators. (8T78:6-9.) Sheriff Schillari had no reason to believe that the people in front of 402 New York Avenue were professional agitators. (8T80:8-11, 77:17-78:3.)

**Hudson Regional Health Commission Noise Measurements**

36. On December 7, 2020, the Hudson Regional Health Commission ("HRHC") was asked to respond to a noise complaint at 402 New York Avenue in Jersey City. (6T28:20-22.) DeGise was the complainant. (6T28:23-24.)

37. HRHC is tasked with enforcing the state noise code. (6T17:12-13.) The state noise code applies to industrial and commercial sources – nothing else – so noise coming from sources that are not industrial or commercial cannot be in violation of the state noise code. (6T60:10-61:1.)

38. Nick Rivelli, who works for HRHC (6T16:4-6), conducted a noise inspection at 402 New York Avenue on Monday, December 7 (T6 30:10-31:1). This noise measurement assignment was unusual (6T70:1-3) – Rivelli had never before measured noise from a protest (6T63:12-14) and the source of the noise was not covered by the state noise code (6T69:25-70:3). Rivelli had no enforcement authority over the source of noise at the protests because the source was neither commercial nor industrial. (6T68:4-9.)

39. Of the thirteen outdoor decibel readings taken by Rivelli, ten had a lower-level decibel range reading that exceeded 65 decibels. (Stip. Facts, ¶ 8; Pl 21.)

40. The Jersey City noise ordinance sets maximum noise levels within the boundaries of Jersey City. (Pl 22 § 222-1.) Between 7 a.m. and 10 p.m., the maximum decibel limit permitted under the Jersey City noise ordinance when

measured outdoors is 65. (Pl 22 § 222-5.2, Table I.) At 10 p.m., this maximum level falls to 50 decibels. (Pl 22 § 222-5.2, Table I.) From 7 a.m. to 10 p.m., the maximum sound level permitted when measured indoors is 55 decibels, and falls to 40 decibels at 10 p.m. (Pl 22 § 222-5.2, Table II.)

41. Under a municipal ordinance, the agency with enforcement authority can issue warnings, citations, and fines. (6T62:7-14.) The Jersey City noise ordinance enumerates the "officers and agents of the City" that have the authority to enforce the ordinance. (Pl 22 § 222-5(D).) The ordinance lists police officers as one category of officers with the authority to enforce the noise ordinance. (Pls 22 § 222-5(D).)

42. Rivelli was never asked to share a noise report with Jersey City law enforcement or with anyone who had the authority to enforce the noise ordinance. (6T70:14-21.)

**Statements About the Protests and Protesters**

43. DeGise published an op-ed in the *Star Ledger* and on NJ.com in which he referred to the protestors as "a group of left-wing extremists." (5T129:12-130:1.) In the op-ed, he aligned the protestors with "radical extremists who don't understand Hudson County and never will." (5T137:11-16.) DeGise wrote that the protestors either recently moved to Hudson County or did not live in the county, painting them as outsiders. (5T135:7-11.)

44. DeGise – a long-time Democrat – believes that the "radical left" is harmful to the Democratic party, and could push people away from the party. (5T137:17-25.) He considers the protesters to be members of the "radical left." (5T129:23-130:19.)

45. Commissioner Anthony Vainieri, who joined DeGise in obtaining a TRO before voluntarily dismissing his claims (Aug. 20 Order), also made a public statement in which he discussed the protestors outside the DeGise residence (Dn 12; 7T20:21-21:1). In the statement, Vainieri referred to protestors against the ICE contract as "extremists" touting a "radical" position (7T22:18-24; Dn 12) and linked the protestors with people who had vandalized a home and people who had yelled at a priest in Bergen County (7T21:20-22:2; Dn 12).

46. Vainieri has described the protestors as "low-life, dirt bag-type people." (7T28:10-13.) He has no respect for the protestors. (7T28:14-16.)

47. Vainieri believes that when members of the public speak at Hudson County Commissioner meetings about the ICE contract, he and his fellow commissioners should leave because "no one want[s] to listen to the same garbage." (7T28:3-9.)

48. When DeGise was Council President of the Jersey City Council, at some point between 1993 and 2001, he was picketed at his residence by firefighters who marched in front of his house on New York Avenue. (5T20:24-21:2.) In

response to the protest, DeGise asked his wife to make lemonade and sent his daughters out to give the lemonade to the protesters. (5T21:4-6.) He then went outside and spoke with the protesters. (5T21:7-8.) DeGise "let the firemen know that they weren't bothering [him]," and he "didn't ask them to leave or anything." (5T175:21-23.) He never called the police about the protesters and did not seek a restraining order. (DeGise Dep. Tr., Dn 1, 94:20-95:2.) DeGise "get[s] along fine with … the firefighters." (DeGise Dep. Tr., Dn 1, 94:6-7.)

## LEGAL STANDARDS

In deciding whether to grant a permanent injunction, the court must parse the evidence to make findings of fact and then "determine whether the applicant has established the liability of the other party, the need for injunctive relief, and the appropriateness of such relief on a balancing of equities." *Rinaldo v. RLR Inv., LLC*, 387 N.J. Super. 387, 397 (App. Div. 2006).

In evaluating Defendants' motion to dismiss under *R.* 4:6-2(e), a court must dismiss a pleading "if it states no basis for relief and discovery would not provide one." *Sashihara v. Nobel Learning Communities, Inc.*, 461 N.J. Super. 195, 201 (App. Div. 2019) (internal quotation marks omitted). "The essential test is whether a cause of action is suggested by the facts." *Id.* at 200 (internal quotation marks omitted). Additionally, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *Goldhagen v. Pasmovitz*, 247 N.J. 580, 593 (2021) (quoting *R.* 4:46-2(c)) (citing *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 528-29 (1995)).

## LEGAL ARGUMENT

Defendants' rights to free speech and assembly are protected under the First Amendment to the United States Constitution and under Article I, paragraphs 6 and 18 of the New Jersey Constitution. *See Green Party of N.J. v. Hartz Mountain Indus., Inc.*, 164 N.J. 127, 142 (2000). The U.S. Supreme Court has "long [] recognized that members of the public retain strong free speech rights when they venture into public streets and parks," as these spaces "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (internal quotation marks omitted) (quoting *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The New Jersey Constitution includes even stronger free speech protections, including an affirmative right to free speech—one that is "broader than practically all others in the nation." *Green Party of N.J.*, 164 N.J. at 145; *see also Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 220 N.J. 71, 78–79 (2014).

As an initial matter, in seeking a permanent remedy, Plaintiff must establish a need for injunctive relief. DeGise cannot make such a showing. Existing municipal ordinances are sufficient to protect Plaintiff's interest in residential privacy; judicial intervention is not an appropriate substitute for the enforcement of local ordinances. Plaintiff DeGise has also failed to demonstrate a basis for making permanent the restraints temporarily imposed by this Court, particularly because DeGise has recently informed ICE that the county will no longer detain people in ICE custody – the very decision that Defendants were advocating when protesting on the sidewalk outside his residence.

The existing and proposed restraints are overbroad and vague, leaving it unclear as to what conduct they prohibit and thereby leaving interpretation of the restraints to the discretion of the County Executive and law enforcement officials. They also create criminal liability without notice for Jane and John Does, an undefined broad swath of people.

The constitutional question before the Court is whether the TRO and requested permanent injunction are presumptively unconstitutional as prior restraints on speech — a determination that requires an analysis of whether the relief is based on the content of Defendants' expression. Based on the evidence admitted at the hearing, the Court should conclude that the injunction was sought due to the content of Defendants' expression, unconstitutionally singles out a particular subject

matter for differential treatment, and provides unchecked discretion that allows for discriminatory enforcement.[7]

However, even if the Court finds that the injunction is content neutral, the evidence admitted demonstrates that the current and proposed orders unconstitutionally burden far more speech than necessary to serve a significant governmental interest and should therefore be invalidated. Defendants do not dispute that Plaintiff DeGise has a right to residential privacy, but the Plaintiff has not established any infringement on privacy comparable to that addressed in *Murray v. Lawson*. Here, the Court is contending with speech directed toward an elected public official that occurred on a busy and public city sidewalk. Even if the Court were to find that the governmental interest is identical to that in *Murray*, the TRO is not tailored to the government's alleged harm. Jersey City's existing ordinances provide the least restrictive manner of meeting the limited government interest. The current and proposed injunctions burden far more speech than necessary to serve the government interest.

[7] Defendants remain concerned about discriminatory enforcement of the injunction, as suggested by the evidence in the record and because DeGise consistently remarked on the race of the protesters. For instance, Plaintiff noted in his opinion piece, testified at his deposition, and insisted in his hearing testimony that the protesters were predominantly white. (5T131:14-15; DeGise Dep. Tr., Dn 1, 168:13-169:9, 171:1-16.) And yet, six out of the eight Defendants are people of color and/or Black, including two of the three people who were arrested on December 8, 2020, as John Does, a day on which Plaintiff concedes there was no protest (*see* Pls.' Br. in Supp. of Mot. for Recons., at 4 (filed May 10, 2021)).

Finally, the existing restraints that Plaintiff seeks to make permanent do not leave ample alternative channels of communication for Defendants. The restraints fail to consider how Defendants can reach their intended audience, and instead relegate Defendants to an area where their message can be neither seen nor heard by DeGise.

For the reasons contained herein,[8] the evidence admitted at the evidentiary hearing only serves to further support Defendants' initial position, and their opposition to Plaintiff's request for a permanent injunction. Defendants ask the Court to dismiss Plaintiff's case and decline to grant Plaintiff's request for permanent relief.

## I. Restraints are not necessary to protect Plaintiff's residential privacy.

Plaintiff incorrectly states that the standard for a permanent injunction is set forth in *Crowe v. De Gioia*, 90 N.J. 126, 132-33 (1982) (requiring only a "preliminary showing of a reasonable probability of ultimate success on the merits"). (*See* Pl.'s Br. at 24.) In fact, *Crowe* governs preliminary and not permanent injunctions. In seeking a permanent remedy, Plaintiff must establish the liability of the other party, the need for injunctive relief, and the appropriateness of the relief

[8] Defendants respectfully incorporate by reference and rely on all the arguments contained within their Opposition Brief, opposing the Order to Show Cause, supporting their motion to dismiss, and supporting the motion to dissolve the temporary restraining order.

when balancing the equities. *Rinaldo*, 387 N.J. Super. at 397. Based on the record before this Court, Plaintiff cannot meet this standard because he cannot demonstrate a need for injunctive relief.

First, Plaintiff does not need particularized injunctive relief because the Jersey City noise ordinance and other existing ordinances are neutral restrictions on activity in neighborhoods, and these ordinances are sufficient to protect Plaintiff's residential interests. *Cf. Horizon Health Ctr. v. Felicissimo*, 135 N.J. 126, 149-50 (1994) (modifying an injunction on protest to more closely hew to Jersey City ordinances). As discussed further *infra* Point IV, Jersey City's ordinances provide the least restrictive means of protecting Plaintiff's residential privacy while preserving Defendants' fundamental right of protest. Unlike injunctive relief, these neutral ordinances have been carefully considered by local legislators to protect residents' interests in privacy and quiet enjoyment of their homes in the context of a big city. Further, because law enforcement officers have experience interpreting them, the risk of discriminatory enforcement is lower than that of vague, court-ordered restraints. Despite the applicability of these ordinances at 402 New York Avenue, there is evidence that they were not enforced during the December protests; Plaintiff instead availed himself of the Court to request personalized protections that tread on Defendants' rights far more than necessary.

Among the neutral ordinances available to protect Plaintiff's interests is Jersey City's noise ordinance, which sets maximum noise levels within the city. (Pl 22 § 222-1.) Between 7 a.m. and 10 p.m., the maximum outdoor decibel limit permitted under the ordinance is 65. (Pl 22 § 222-5.2, Table I.) At 10 p.m., this maximum level falls to 50 decibels. (*Id.*) Defendants sought to comply with this ordinance, taking care to end the louder portion of the protests at exactly 10 p.m. (Stip. Facts, ¶ 26; 5T160:5-9; 8T125:25-126:3; DeGise Dep. Tr., Dn 1, 60:11-15; Gregg Dep. Tr., 30:25-31:8, 47:11-12; Pl 37, 16:7-12.) However, as Defendants concede, many of the noise measurements on the night of December 7 exceeded the noise ordinance limits. (Stip. Facts, ¶ 8; Pl 21.) Although police officers have the authority to enforce the ordinance (Pls 22 § 222-5(D)), and DeGise has unusual access to law enforcement (*see*, *e.g.*, 5T161:3-18; DeGise Dep. Tr., Dn 1, 53:18-24), Defendants were never issued any citations or fines. (Stip. Facts, ¶ 19; 8T73:21-74:2; 8T100:19-23; 8T126:14-19.) Indeed, the HRHC employee who performed the noise measurements was never asked to share a report with anyone who had the authority to enforce the noise ordinance. (6T70:14-21.)

Plaintiff and local law enforcement could have enforced the existing ordinances. Defendants' efforts to comply with the noise ordinance suggest that enforcement efforts would have been effective. DeGise therefore has no need for additional injunctive relief.

Plaintiff also cannot meet the standard for permanent injunctive relief because there is no evidence that Defendants will return to protest outside the DeGise residence. Plaintiff cites to Defendants' "refusal to agree not to protest in front of Plaintiff's home if the TRO was not in place" to justify permanent restraints. (Pl.'s Sept. Br., at 24.) Notably, Plaintiff cites to Defendant Little's deposition to emphasize that Defendants would continue to protest "*if the ICE contract was not canceled*" (*id.* (emphasis added)), and quotes the flyers distributed in DeGise's neighborhood which state "every night 'til Tom does right" to mean that the protests would continue "*until the County Executive canceled the ICE contract*" (Pl.'s Sept. Br., at 15 ¶ 93 (emphasis added)). Plaintiff pins his argument on the assumption that protests will continue in opposition to the ICE contract. On September 10, 2021, however, Plaintiff did exactly what Defendants urged him to do: he penned a letter indicating that Hudson County would no longer house people at the behest of ICE. Consequently, DeGise cannot point to any evidence suggesting that protests outside of his residence will continue, and he fails to demonstrate any need for permanent injunctive relief.

## II. The current and proposed orders are vague and overbroad.

Defendants have argued in their opposition to the TRO and proposed injunction[9] that the language of these orders is unconstitutionally vague, over-inclusive, and fails to provide notice of what is prohibited both to those bound by them and to those charged with enforcing them. While Defendants acknowledge that the Court refused to admit evidence related to these issues, to preserve this constitutional argument, they respectfully incorporate their June 15, 2021 Letter-brief ("June 15 Letter") and June 23, 2021 Reply-brief ("June 23 Letter") to the Court supplementing their objection to the decision not to permit argument or evidence on the vagueness of the TRO.

As argued previously, the TRO on its face is unconstitutionally vague and overbroad. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); *see also State v. Moran*, 202 N.J. 311, 326 (2010) ("Vague laws violate due process by failing to 'provide adequate notice of their scope and

[9] Defendants note that despite the withdrawal of four out of five of the named plaintiffs in this matter, Plaintiff asks the Court to "impose [] a permanent injunction in Plaintiff's favor barring protesting in accordance with the terms and conditions imposed by the Court's December 8, 2020 TRO," (Pl.'s Sept. Br., at 3-4), and added a new request that the permanent injunction bar the use of sound amplifying devices (*id.* at 4 n.2), without submitting a proposed order for this Court's consideration. Defendants assume that Plaintiff's proposal for injunctive relief remains largely the same and preserves their right to ask the Court to reconsider its decision on permitting them to file a sur-reply should that position change.

sufficient guidance for their application.'" (quoting *State v. Cameron*, 100 N.J. 586, 591 (1985)); *State v. Clarksburg Inn*, 375 N.J. Super. 624, 633 (App. Div. 2005) (requiring that ordinance define offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited . . . ." (internal quotation marks omitted) (quoting *State v. Golin*, 363 N.J. Super. 475, 482-83 (App. Div. 2003)). Among other defects, the TRO and proposed injunction do not define "protest," and they restrain speech and assembly throughout the county, not only near Mr. DeGise's residence.[10]

As explained on the record, had Defendants been permitted to ask witnesses about the events of December 8, 2020, and about the enforcement of the TRO, and to introduce relevant evidence obtained in discovery, such evidence would have further supported their argument that the TRO was not clear on its face as to the conduct prohibited, and imposes overbroad restrictions on protected First Amendment activities. For example, documents produced by HCSO show that Sheriff Schillari construed the order to permit his agents to arrest anyone present in the vicinity of Mr. DeGise's residence, regardless of whether they were participating in a protest. Evidence of how law enforcement officers understood or construed the

[10] Leafletting is a core constitutionally protected activity, *see*, *e.g.*, *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997), and, among other constitutionally protected actions, one engaged in by Defendants (*see*, *e.g.*, Compl., Ex. 1) before this Court prohibited activities outside of the DeGise residence.

TRO is directly relevant to whether the TRO's language, and that of any permanent restraints, is unconstitutionally vague. Evidence of prior enforcement against Defendants themselves is also highly relevant to understanding the breadth and clarity of the document. *Cf. Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) (finding standing to bring First Amendment claims because "the threat of future enforcement . . . is substantial . . . . We have observed that past enforcement against the same conduct is good evidence that the threat of enforcement is not chimerical" (internal quotation marks omitted)).[11]

If permitted, Defendants would have sought to admit evidence including: recordings of HCSO radio transmissions and/or phone calls between HCSO officers, including instruction that officers could arrest anyone present near Mr. DeGise's residence; arrest reports from December 8, when Plaintiff concedes no protest occurred; and testimony from DeGise, Sheriff Schillari, and Sergeant Flannelly with regard to the events of December 8, their understanding of the TRO's restraints, and enforcement efforts.[12]

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[11] The *Murray* Court also considered the ease of enforcement when evaluating the constitutionality of proposed injunctive terms. 138 N.J. at 234.

[12] Plaintiff erroneously contends that the fact that "Defendants exercised their First Amendment right to protest the ICE contract in other public venues even *after* the TRO was entered . . . dispels any argument that the TRO and proposed permanent injunction are vague and overbroad." (Pl.'s Sept. Br., at 23.) Defendants' participation in protests outside of Hudson County or unrelated to the ICE protests aimed at DeGise does not resolve the deterrent effect that the overbroad TRO had

## III. The evidence elicited at the hearing confirmed that the injunctive relief sought is based on the viewpoints of the protesters, is not content neutral, and is a prior restraint and presumptively unconstitutional.

Defendants similarly urge the Court to engage in a full constitutional analysis when assessing whether the TRO should remain in place, and whether a more permanent injunction is appropriate. "Above 'all else, the First Amendment means that government' generally 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)). While the Court has stated it would limit its inquiry to the tailoring prong of the constitutional analysis, Defendants respectfully submit that the State and Federal Constitutions require analysis of the earlier prongs as well. When curtailing otherwise protected speech under the First Amendment, a court

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on Defendants' fundamental rights, nor suggests that Defendants were able to parse the contours of the TRO's restraints. First, public participation in county council meetings is not a protest. (*See id.* at 16 ¶ 98; 23). Second, that some Defendants participated in protests outside of Hudson County (*see id.* at 16 ¶¶ 99, 101) does not address the question of whether the TRO would restrict their participation in such protests within Hudson County. Finally, the fact that Defendant Little managed to participate in protests in Hudson County after the TRO was issued, (*see id.* at 16-17 ¶ 101), speaks only to the risk one Defendant was willing to take, not to the question of whether Hudson County law enforcement intend to enforce the TRO against him or other Defendants in the future. In light of the vague, overbroad TRO language, this isolated fact does not eliminate the risk, fear, and deterrence that Defendants are currently experiencing. (*See*, *e.g.*, Torres Dep. Tr., 103:12-15 ("Q. Your statement that people feel fear for their personal safety, that's not you, right, you don't feel for your personal safety, do you? A. I do. I don't want to be arrested.").)

must conduct an initial inquiry that assesses the appropriate level of scrutiny, which depends in part on whether the injunction is based on the content of the expression. *E&J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin*, 226 N.J. 549, 570 (2016); *see also Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 166 (2015) (explaining that the first inquiry by the Court must be "whether a law is content neutral on its face *before* turning to the law's justification or purpose" (emphasis in original) (collecting cases)). Should the Court issue the proposed permanent injunction without considering the first part of the constitutional analysis, Defendants will have had no opportunity to contest either the motivation for government action or the level of scrutiny that should be afforded the temporary and permanent restrictions requested by the Plaintiff.

The TRO as written, and the permanent injunction sought, are not content neutral. As an initial matter, the text of the TRO is itself not content neutral. As explained in Defendants' Opposition Brief, the TRO restricts protest around the homes of elected officials who supported the decision to continue the ICE contract but who have had no protests at their homes, illustrating that it was intended to target only people demonstrating in opposition to the ICE contract; TRO provisions (D)–(G) show an intent to prevent named Defendants from protesting without geographic restriction, as opposed to an interest tethered to Plaintiff's residential privacy; and the TRO's requirement that Defendants notify the HCSO and local police in advance

of any protest suggests a particular intent to target and monitor the activities of Defendants, presumably for expressing their views on the contract, because notice is not required for other similar activities in Jersey City.

Moreover, as further described herein and outlined in the Opposition Brief, the TRO and proposed injunction are so vague and indefinite that they provide unbridled discretion to the officials enforcing them, amounting to *per se* viewpoint discrimination. *See Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988). Such policies are unconstitutional because "without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *Id.*; *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132–33, 133 (1992) (striking down an ordinance for providing "unbridled discretion" because its standards were not narrowly drawn, reasonable, and definite).

Even if this Court does not consider the relief sought by Plaintiff to amount to *per se* viewpoint discrimination, the evidence shows that the TRO and proposed permanent injunction result in viewpoint discrimination. As outlined in Defendants' Opposition Brief, and as the First Circuit has effectively summarized, the Supreme Court has identified "various situations which will lead a court to conclude that, despite the seemingly neutral justifications offered by the government, nonetheless

the decision to exclude speech is a form of impermissible discrimination." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 87 (1st Cir. 2004). Three are relevant here:

> First, statements by government officials on the reasons for an action can indicate an improper motive. Second, where the government states that it rejects something because of a certain characteristic, but other things possessing the same characteristic are accepted, this sort of underinclusiveness raises a suspicion that the stated neutral ground for action is meant to shield an impermissible motive. . . . Third, suspicion arises where the viewpoint-neutral ground is not actually served very well by the specific governmental action at issue; where, in other words, the fit between means and ends is loose or nonexistent.

*Id.* (internal citations omitted) (citing in support to *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977); *Cornelius v. NAACP Legal Def. and Educ. Fund,* 473 U.S. 788, 812 (1985); *Purkett v. Elem*, 514 U.S. 765, 768 (1995)). All three scenarios are present here. First, DeGise tolerates certain forms of protest and not others. Second, evidence shows he has an improper motive rooted in animus. Finally, the proposed relief is over-inclusive.

### A. Plaintiff treated Defendants differently than other picketers based on the content of their message.

Government action is content based under the First Amendment when it is premised on actions rooted in animus towards a particular group.[13] *See*, *e.g.*, *Reed*,

[13] As Defendants argued in the Opposition Brief, Plaintiff's decision to seek injunctive relief only for protesters who hold a particular political viewpoint, and to take no action with respect to other protests, is inconsistent with the Equal Protection Clause. *Police Dep't of City of Chi.*, 408 U.S. at 96 ("[The government] may not select which issues are worth discussing or debating in public [facilities]. There is

576 U.S. at 165; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30 (1993); *Simon & Schuster, Inc. v. Members of N.Y.S. Crime Victims Bd.*, 502 U.S. 105, 117 (1991). The protests and vigils at issue were not the first time that DeGise experienced a protest outside of his residence. (*See generally* 5T20-21, 175.) When Plaintiff was the president of the Jersey City Council, a group of firefighters marched in front of his home on New York Avenue. (*Id.* at 20:24-21:2.) Without first observing the protest but after learning that the firefighters were picketing outside, DeGise "asked [his] wife if she would make a big thing of lemonade and send the girls [his daughters, out] . . . with the lemonade." (*Id.* at 21:4-6.) He "[t]hen [] went out and chatted with them." (*Id.* at 21:7-8.)

These actions stand in stark contrast to Plaintiff's response to the protesters that gathered outside of his home in December 2020 to oppose the County's contract with ICE — he refused to speak with them (5T46:21-23), he called the police, and did so just after determining that they were protesting the ICE contract (5T65:9-13; DeGise Dep. Tr., Dn 1, 47:4-9), and he joined other government officials who never had protests outside of their homes to secure a restraining order.

### B. Plaintiff and the former Plaintiff-Commissioners targeted Defendants for restrictions on speech because their political views were at odds with Plaintiffs'.

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an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard." (internal quotation marks and footnote omitted)).

The record shows that DeGise and former plaintiffs displayed animus toward the particular political viewpoints of Defendants and others opposing the ICE contract or promoting other progressive views. DeGise's animus was evident from the opinions he shared publicly and his testimony.[14] *Cf. Ridley*, 390 F.3d at 86 ("Suspicion that viewpoint discrimination is afoot is at a zenith when the speech restricted is speech critical of the government, because there is a strong risk that the government will act to censor ideas that oppose its own.") (citing in support to *Texas v. Johnson*, 491 U.S. 397, 411-17 (1989)).

When testifying about how he identified the protesters, DeGise emphasized their likely political affiliations with the Hudson County "progressive[s]" multiple times. (*See*, *e.g.*, 5T134:18, 136:10.) Plaintiff made that leap without even knowing whether Defendants are part of that political group. (*See* 5T136:15-21 (Q: But that – what you are doing is, I think – correct me if I am wrong here – is you are describing people who are commenting on the Hudson County progressive

[14] DeGise's animus is also evident in the differential treatment he afforded different groups of protesters: he characterized Defendants as "outsiders" who are telling him and other people in Hudson County what to do (DeGise Dep. Tr., Dn 1, 160:9-14, 170:21-25 (stating that "when people from out of town . . . come here and tell us everything that we're doing wrong, kind of ticks us off a little bit"), while describing firefighters who protested at his home as part of his community (*id.* at 94:5-7 (stating "I get along fine with people with the firefighters"), 184:22-185:3 (describing the firefighters as "friends of mine doing their thing")). He was only willing to speak with and listen to the viewpoints he deemed acceptable. (5T21:7-8 (explaining that he went outside his home to speak with the protesting firefighters); 5T46:21-23 (stating that he did not want to "engage in conversation" with the ICE protesters).)

Democrats site. How do you know that those are the people who are in front of your house? A: I don't know that.").) Indeed, during his testimony, DeGise identified a political reason for disallowing protests outside of his residence as not wanting to "continue to drive people away from our [Democratic] party." (5T138:23-24.)

Plaintiff further showed his animus when maligning Defendants and other protesters in public statements that emphasized their political viewpoint. In his testimony at the evidentiary hearing, DeGise did not deny that he authored an op-ed "call[ing] this group of people isolated radical extremists who don't understand Hudson County and never will." (5T137:11-16.) He noted that "the movement that has begun, runs the risk of pushing people into another party" and that they must "find some middle ground if we [the Democrats] are going to survive." (5T137:17-20.) In making that argument Plaintiff identified Defendants as being "radical leftist[s]" who are "harmful to that effort." (5T137:21-22; *see also* 139:1-3 ("I referred to our [political] party. We are nothing if we can't bring it together. We are nothing. And I believe the progressive thing is pushing you away.").) Plaintiff verbalized the same sentiments during his deposition. In response to a question about what he meant when calling Defendants and other anti-ICE protesters "a group of left-wing extremists," he explained:

> I called them – because they are, you know, for most of the country and for our party, the Democratic Party, you know, I remember one time I said something along the lines that I wanted to see what happened when we had a new president, that Joe Biden, you know, would be a game

> changer and I'd like to sit down. And I was criticized by them saying that nobody threw more people out of the country than Barack Obama and Joe Biden. That they didn't like Biden, they didn't like that at all. You know, that is a left wing extremist.

(DeGise Dep. Tr., Dn. 1, 167:9–21.) Plaintiff brought this case to target a particular political viewpoint, one that he believes will endanger the Democratic Party as he knows it.

This argument comes into sharper focus when considering that there was no protest outside the homes of the former Plaintiff-Commissioners who initiated this suit, and that these government officials have now voluntarily dismissed their claims. The prohibition against protesting outside of the homes of the former Plaintiff-Commissioners was *never* constitutional since at every point in this litigation they failed to establish any harm or need for injunctive relief, and the relief granted and sought was never tailored as to them. (*See*, *e.g.*, 2d Am. Compl. (discussing solely DeGise's experiences).) Moreover, the fact that Plaintiff-Commissioners dropped out of the lawsuit without introducing individualized evidence of harm or waiting for permanent relief underscores the animus that

motivated all Plaintiffs' claims.[15] They never had a concrete need for the Court to protect their residential privacy or any other governmental interest.[16]

### C. A higher level of scrutiny is warranted because this matter concerns political speech in a public forum.

Regardless of whether the Court finds that animus motivated Plaintiff's lawsuit, heightened scrutiny is required here because the restraints focus on political speech, which "lies at the core of our constitutional free speech protections." *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 210 N.J. 482, 499 (2012) (internal quotation marks omitted). As Defendants noted in their Opposition Brief, "[t]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of . . . all matters relating to political processes." *Id.*

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[15] For example, Vainieri has described the protestors as "low-life, dirt bag-type people." (7T28:10-13.) He has no respect for the protestors. (*Id.* at 28:14-16.) Like DeGise, Vainieri made a public statement about the protesters in which he referred to them as "extremists" touting a "radical" position. (*Id.* at 22:18-24; Dn 12.) Vainieri has also portrayed individuals opposed to the ICE contract as holders of a minority opinion, contrasting them with a "strong majority of people" and the "vast majority of Americans." (Dn 12; *see also* 7T22:3-8 (stating that he believes opponents to the ICE contract are the "minority view" in his Commissioner district).) He has encouraged his fellow commissioners to leave their public meetings when members of the public speak out against the ICE contract because "no one want[s] to listen to the same garbage." (7T28:3-9.)

[16] If the Court finds that that the TRO is content based, the government's interest in residential privacy is "not such a transcendent objective" to outweigh speech in a public forum, making this analysis moot. *See Boffard v. Barnes*, 264 N.J. Super. 11, 16 (App. Div. 1993) (citing *Carey v. Brown*, 447 U.S. 455, 465 (1980)).

(internal quotation marks and alteration omitted) (alterations added) (quoting *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966)). Strict scrutiny is the standard used for content-based restrictions on speech because content-based actions "have the constant potential to be a repressive force in the lives and thoughts of a free people." *Free Speech Coal., Inc. v. Att'y Gen. U.S.*, 974 F.3d 408, 420 (3d Cir. 2020) (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004)). Such actions are "presumptively unconstitutional" and may only be justified if they serve a compelling governmental interest, are narrowly tailored to achieve that interest, and are the least restrictive means of advancing that interest. *Id.* For the reasons discussed in the preceding section and prior briefing, the record establishes that the TRO and proposed injunction restrict speech based upon the speakers' political views.

Notably, the restraints at issue in this case not only restrict political speech, but they do so in a forum quintessentially reserved for free expression. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (finding that "a street or park is a quintessential forum for the exercise of First Amendment rights" as an "essential venue[] for public gatherings to celebrate some views, to protest others, or simply to learn and inquire"). As described *supra*, the protests, vigils, and leafletting at issue occurred only on a public street and sidewalk, and did not cross the line onto Plaintiff DeGise's property.

Significantly, government actors brought this case in their official capacities and have expended enormous public resources to litigate it. For that reason alone, strict scrutiny is necessary to ensure appropriate government action. *State v. Burkert*, 231 N.J. 257, 275–76 (2017) (The "scrutiny to be accorded [government action] that trenches upon first amendment liberties must be especially scrupulous.") (internal citation omitted).

Government resources were used in several ways. Most significant is the use of the HCSO in responding to DeGise. (*See*, *e.g.*, 8T123:4-6 (testimony from Sergeant Flannelly that he was outside of the DeGise residence as part of an overtime detail).) In fashioning HCSO's response, the County Executive communicated directly with Sheriff Schillari about the protests, vigils, and leafleting (*see*, *e.g.*, 8T49:2-11, 65:2-11; DeGise Dep. Tr., Dn 1, 53:22-24), and the HCSO officers, employed by the County, who responded to the DeGise residence reported to the Sheriff every day that there were protests (8T69:14-15). The HCSO response was not typical—in orchestrating the officers' response, Sheriff Schillari prioritized the County Executive's telling over that of his own staff. (*See*, *e.g.*, Dn 69 (Sheriff Schillari countering reports of peaceful protestors by HCSO officers, stating that "no, they're not peaceful – the County Executive called me").)

The County also expended its resources to gather evidence for this case. For example, Nick Rivelli, an employee of HRHC – an independent agency paid by the

county (5T188:21-189:4) that enforces the State noise code – was tasked with collecting noise measurements at the DeGise residence even though the State noise code applies only to industrial and commercial sources, and is not applicable when connected to a residential property (6T60:7-24). In fact, Rivelli had no authority to enforce the relevant municipal noise ordinance. (*Id.* at 68:22-24.) In his two decades of service at HRHC, Rivelli had never before been asked to measure noise from a protest (*id.* at 62:15-63:14), and only took noise measurements after a personal request by the County Executive (DeGise Dep. Tr., Dn1, 71:22-25 ("I'll take responsibility for, you know, to bringing them in."); 5T147:14-16 (describing "the plan" for HRHC).) Additionally, the Special Investigations Unit ("SIU") of the Law Department for the County investigated and documented the protest because the County Executive believed that he would have to "go on the offensive and force the protestors from 402 New York Avenue," and "the SIU was gathering information that would be helpful in that effort." (DeGise Dep. Tr., Dn 1, 178:21-79:2). This type of governmental action against residents of the State based on the political content of their message warrants increased scrutiny.

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The County Executive treated different groups of protesters differently, publicly derided the political content of Defendants' speech, and used governmental resources to bring this litigation, rendering strict scrutiny the appropriate level of

review under the federal and state constitutions. As described below, the evidence on the record further clarified that the restrictions in place and proposed are not narrowly tailored under any level of scrutiny, and are not the least restrictive means of advancing the limited government interest in this matter.

## IV. Even if the injunction sought is found to be content neutral, it is not narrowly tailored because it burdens far more speech than necessary to serve the government's interest.

Defendants recognize that the Court has stated that it intends to analyze whether the time, place, and manner restrictions imposed on Defendants are constitutionally tailored. Defendants respectfully preserve their objection that a time, place, and manner analysis is not the constitutionally correct standard when evaluating injunctive relief. Because generally applicable ordinances "represent a legislative choice regarding the promotion of particular societal interests" and injunctions "carry greater risks of censorship and discriminatory application," an injunction—even a content-neutral one—is held to "a somewhat more stringent application of general First Amendment principles[.]" *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764–65 (1994).[17] In *Madsen*, finding the time, place, and

[17] For that reason, Defendants contend that the federal circuit cases relied on by Plaintiff are inapposite to the question of appropriate restrictions as they evaluate the constitutionality of ordinances—legislative choices—and not injunctive relief, or a judicial decision aimed solely at a particular group of people, and therefore utilize the incorrect legal standard. (*See* Pl.'s Sept. Br., at 20-21 (citing *Bell v. City of Winter*

manner analysis insufficiently rigorous, the U.S. Supreme Court "ask[ed] instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 765–66 (collecting United States Supreme Court cases). Similarly, the New Jersey Supreme Court in *Murray v. Lawson* did not use the "time, place, and manner" formulation as the relevant inquiry but considered whether the "restrictions burden[ed] [] more speech than necessary to protect plaintiffs' residential-privacy interest." *Murray*, 138 N.J. at 234. Using the more restrictive test from *Madsen*, the *Murray* Court narrowed the terms of the injunction following remand from the United States Supreme Court. *Id.* at 227, 232-233. Contrary to Plaintiff's arguments (*see* Pl.'s Sept. Br., at 18-19), injunctive relief "must be crafted on a fact-specific basis," *Murray*, 138 N.J. at 232;

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*Park*, 745 F.3d 1318 (11th Cir. 2014)); *Thorburn v. Austin*, 231 F.3d 1114 (8th Cir. 2000); *Klein v. San Diego County*, 463 F.3d 1029 (9th Cir. 2006)).)

Defendants do, however, amplify two teachings from the cases cited by Plaintiff. First, the Eleventh Circuit's decision in *Bell v. City of Winter Park* strikes as unconstitutional the section of an ordinance that "does not target any particular form of speech or conduct . . . [but] grants virtually unfettered discretion in how it is enforced." 745 F.3d at 1324-25. Defendants also note that the ordinance at issue in *Bell* defined the word "protest" and the particular conduct prohibited. *Id.* at 1321 n.3. Defendants also highlight the Ninth Circuit's statement in *Klein v. San Diego County* which, citing to *Murray*, states that "[t]he combined teaching of *Frisby* and *Madsen* is that the government's interest in residential privacy does not trump all other rights. . . . [T]he right to residential privacy does not encompass a right to remain blissfully unaware of the presence of picketers." *Compare Klein*, 463 F.3d at 1035 (citing to *Murray*, 138 N.J. at 232-33), *with* Pl.'s Sept. Br., at 26 ("[T]he First Amendment must yield to an individual's right to residential privacy as recognized in *Murray*, *Frisby*, and their progeny.").

*see also Horizon Health Ctr.*, 135 N.J. at 148 ("Injunctions necessarily require an individualized balancing of rights."). The Court therefore cannot simply adopt the restrictions the *Murray* Court found appropriate without analyzing whether those restrictions are tailored to the evidence of alleged harm on which Plaintiff relies.

### A. Plaintiff's residential privacy interests do not justify the proposed injunction.

While the government has an interest in safeguarding residential privacy, *see*, *e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Carey*, 447 U.S. at 470–71, the facts on the record do not justify the restrictions in place or requested by Plaintiff.[18] Moreover, jurisprudence from the New Jersey Supreme Court and U.S. Supreme Court does not support Plaintiff's contention that "the fact that the ICE Protests occurred in front of Mr. DeGise's home is, in and of itself, dispositive of the issue entirely." (Pl.'s Sept. Br., at 19.) In contrast to Plaintiff's argument that the First Amendment always yields to residential privacy (Pl.'s Sept. Br., at 26), the two interests must be balanced. *Murray*, 138 N.J. at 232-33 ("[K]eeping defendants at such a great distance, thereby rendering plaintiffs' awareness of the picketing most unlikely as a practical matter, is unnecessary to protect plaintiffs' residential-privacy

[18] Notably, *Frisby* addressed the issue of residential privacy in the context of a local ordinance limiting residential picketing. *See* 487 U.S. at 488. In contrast, Plaintiff's proposed order does not reflect any legislative process. Jersey City has elected to protect residents from undue noise through its noise ordinance (*see* Pl 22 § 222-1), and not by restricting assembly.

interest."). Furthermore, that analysis necessarily includes a complete record and understanding of the facts of the neighborhood. *See id.* at 232-35 (analyzing the street and neighborhood of plaintiffs when considering appropriate restrictions).

Because this is a balancing analysis, the Court should consider not only the existence of a residential privacy interest, but also the appropriate tailoring of any restrictions. By restricting protests to a certain corner (*see* Pl.'s Sept. Br., at 18), the Plaintiff argues for restrictions so broad that the Defendants would have no effective way of sharing their message with the neighborhood.[19] The record before this Court does not support such a drastic curtailing of First Amendment rights.

In *Madsen*, the U.S. Supreme Court, in discussing the right to residential privacy, differentiated the 300-foot zone around the residences in that case from the ordinance at issue in *Frisby* that "made it unlawful for any person to engage in picketing before or about the residence or dwelling of any individual." 512 U.S. at 775 (internal quotation marks omitted) (citing to *Frisby*, 487 U.S. at 477). But, in evaluating injunctive relief, the *Madsen* Court did not find that the record justified a "broad [] ban on picketing" akin to that in *Frisby*. 512 U.S. at 775. Rather, it noted that the injunctive provisions would "ban . . . even walking a route in front of an entire block of houses." *Id.* (internal quotation marks omitted) (quoting *Frisby*, 487

[19] A discussed *infra* section V, restraints must leave open ample alternative channels for communication, which must take into account the practical realities of how speakers can reach their intended audience.

U.S. at 483). That type of ban, found unconstitutional in *Madsen*, is exactly what Plaintiff is seeking. (Pl.'s Sept. Br., at 18-20.)

Additionally, for the same reasons that Plaintiff's residential privacy interests cannot justify court intervention, Plaintiff's contention that restraints are necessary to prevent DeGise from being a "captive audience" must fail. (Pl.'s Sept. Br., at 19-20.) Defendants not only generally conformed with applicable ordinances when they were aware of potential violations, but their actions were similar to those of prior protesters whom Plaintiff DeGise welcomed. An injunction in this case would result in a blanket rule with no limiting principle. Under this interpretation of *Murray*, anyone could get an injunction to stop people from free speech activities in the vicinity of their home regardless of what the municipality's governing body had already determined was appropriate for all who might protest in a residential neighborhood.

### B. The TRO and proposed injunction burden more protected speech than required to serve the government's limited interest.

The TRO and proposed injunction burden far more protected speech than necessary to serve the government's limited interest. As Defendants have maintained, and as the testimony supports, the current and proposed restrictions are overinclusive, *see Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 805 (2011) (holding that "when they affect First Amendment rights," governmental interests "must be pursued by means that are neither seriously underinclusive nor seriously

overinclusive"), and insufficiently precise to pass constitutional muster, *see Madsen*, 512 U.S. at 765-66 (quoting *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 916 (1982), for proposition that "when sanctionable conduct occurs in the context of constitutionally protected activity precision of regulation is demanded" (alteration omitted) (internal quotation marks omitted)). The Jersey City noise ordinance and other ordinances already in place are neutral restrictions on activity in neighborhoods and are sufficient to protect Plaintiff's residential interests. *Cf. Horizon Health Ctr.*, 135 N.J. at 149-50 (modifying an injunction on protest to more closely hew to Jersey City ordinances).

**i. The TRO, on its face, burdens far more speech than necessary.**

Even if content-neutral, "laws may not transgress the boundaries fixed by the Constitution for freedom of expression." *Burkert*, 231 N.J. at 275–76 (internal quotation marks omitted) (quoting *Winters v. New York*, 333 U.S. 507, 515 (1948)). An order relating to First Amendment rights "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). "In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' In other words, the order must be tailored

as precisely as possible to the exact needs of the case." *Id.* at 183-84 (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

The activities prohibited by the TRO and proposed injunction in this matter burden a substantial amount of First Amendment speech and are not narrowly tailored. The limitations here are more restrictive than even those imposed in *Murray v. Lawson*, in which the New Jersey Supreme Court modified the trial court's initial injunction after the U.S. Supreme Court's remand and decision in *Madsen*. As modified, the injunction in *Murray* provided that Defendants and all those in active concert or participation with them:

> (1) are prohibited at all times and on all days from picketing in any form within 100 feet of the property line of the Murray residence, located at 917 Carlton Road, Westfield, New Jersey;
>
> (2) may picket in a group of no more than ten persons outside the 100–foot zone around the Murray residence for one hour every two weeks;
>
> [and]
>
> (3) must notify the Westfield police department at least twenty-four hours prior to any intended instance of picketing pursuant to this injunction of the number of picketers and of the time and duration of the intended picketing.

138 N.J. at 234.

In modifying the injunction, the *Murray* Court attempted to ensure that "defendants w[ould] be able to get their message across." *Id.* Because the TRO in this case does not strike this balance, it cannot withstand scrutiny.

As to Plaintiff, the TRO and proposed permanent injunction preclude Defendants from protesting or picketing *anywhere except* "in the area limited to the corner of New York Avenue and Congress Street." (TRO, at ¶ B.) By its own terms, which Plaintiff has asked this Court to make permanent, the TRO may be read to prohibit protesting and picketing in all of Jersey City. A TRO that confines *all* expressive activity directed toward DeGise to a single street corner in the entirety of Jersey City–also precluding, presumably, speech outside of DeGise's county office–is clearly not narrowly tailored.

However, even if the parties were to read the TRO as instituting a 200-foot buffer zone, that zone is not warranted, is not narrowly tailored, and is not crafted to the facts of this case; it is based on the facts of *Murray v. Lawson*. *See Murray*, 138 N.J. at 232 ("Although the trial court appropriately looked for guidance to decisions of other courts considering similar issues, an injunction must be crafted on a fact-specific basis."). In *Murray*, the injunction was modified to a 100-foot buffer zone that considered the lot size of the plaintiff, narrowing the buffer zone between picketers and the intended recipient to a mere one-and-a-half lots. *Id.* at 234. The buffer zone also still permitted the picketers to picket on the plaintiff's block. *Id.* at 223. Considering these facts, the *Murray* Court specifically tailored its injunction to prevent only activity that "inherently and offensively" interfered with the plaintiff's residential privacy, *id.* at 224, including entering the property to ring the doorbell

and initiating direct contact with the occupants of the home. *See id.* at 212. Most importantly, the modified *Murray* injunction was sufficiently limited to allow the plaintiff to hear the picketers' message and was tailored to permit "the Murrays [to] enjoy their domestic tranquility inside their house, but if they choose to go out into their yard, they will see the picketers a mere lot-and-a-half away." *Id.* at 234. The Court concluded that the initial 300-foot injunction was "too broad" because "if plaintiffs stayed within their residence or even walked out into their yard, the picketers and their placards would not likely be visible 300 feet away." *Id.* at 232–33.

Most of the lots on DeGise's block are the same size as his or smaller, and measure—25 by 100 feet. (5T85:23-86:11; Stip. Facts, ¶ 25.) If the Court were to approach the reasoning of *Murray* simply as an equation, a buffer zone that is one-and-a-half lot sizes would measure 37.5 feet. And the Court found equally important the question of whether the protest was visible to the residents of the household. *Murray*, 138 N.J. at 232-33. DeGise offered conflicting testimony as to whether he could hear activity on the corner delegated by the Court. In his deposition he was clear that he could not hear activity on that corner. (DeGise Dep. Tr., Dn1, 188:12-14.) Thus, his testimony to the contrary at evidentiary hearing was not credible. (5T82:21-83:2.) Moreover, DeGise consistently admitted that it was impossible to

*see* the activity on that corner from his residence. (5T82:8-16.) Defendants are not able to convey their message if the County Executive cannot see or hear them.

Moreover, the intrusion on residential privacy experienced by the plaintiffs in *Murray* was more significant than the intrusions that DeGise alleges, even assuming all the facts he alleges are true.[20] For example, the police in *Murray* counted fifty-seven picketers on a single day, 138 N.J. at 212, when the protests at issue consisted of only ten to fifteen people each evening (Stip. Facts, ¶ 20). Defendants demonstrated compliance with local ordinances when they were aware of potential violations (8T124:21-126:3) and were never ticketed or charged with violating the

[20] Plaintiff's testimony about what occurred at the protest is inconsistent with the other admitted evidence. For instance, what Plaintiff described as an out-of-control protest (8T61:21-62:120), the HCSO officers on scene consistently reported as peaceful (8T50:20-24; Dn43; Dn82A; Dn69). Additionally, DeGise testified that "[e]very day they shined the flashlights in. Every day." (5T155:24-25.) And yet, the officers on scene testified that after December 3, they observed only one person shining a light into the DeGise residence, and she immediately stopped when asked. (8T124:21-125:5, 98:18-24.) That fact was corroborated by Defendants' deposition testimony (*see*, *e.g.*, Gregg Dep. Tr., 71:6-72:1), and video of the protest (Pl. 4).

Plaintiff's reliance on Aida Ortiz to corroborate his story is unavailing (*see* Pl.'s Sept. Br., at 3, 10) as she is an unreliable witness. Ortiz is a Hudson County employee (6T115:25) in the midst of a significant suspension from employment due to an administrative adjudication that she committed fraud (*id.* at 119:4-8, 120:6-121:4). If she incurs even one more infraction she is at risk of termination and losing her pension. (*Id.* at 122:3-123:5.) She is also aware that DeGise is "a powerful government official in Hudson County" (*id.* at 116:4-6) and she has been friends with Commissioner Romano, a plaintiff at the time she testified, "for a long time" (*id.* at 116:7-13). The precarity of her employment, coupled with Ortiz's relationships with these two powerful individuals, provides her with every incentive to corroborate Plaintiff's testimony.

law (Stip. Facts, ¶ 19; 8T99:19-22 (testimony by Captain DeGennaro that officers did not see any activity that constituted a criminal offense)), despite consistent HCSO presence. In contrast to *Murray*, protesters never rang Plaintiff's doorbell, never asked a child to bring a message to him, did not display gruesome pictures, did not make frightening statements to neighborhood children, and did not enter his property. *Compare Murray*, 138 N.J. at 212-13, *with* (5T108:11-13; 8T123:17-124:20; DeGise Dep. Tr., Dn 1, 75:15-16). Should the Court find restrictions necessary, utilizing the framework in *Murray*, injunctive relief should be proportionally less than the restrictions in that case, and consistent with the harm Plaintiff alleges.

**ii. The TRO and proposed permanent injunction are not narrowly tailored because they burden speech beyond what is directed at Plaintiff.**

The TRO and proposed injunction are also not narrowly tailored because they burden speech beyond what is directed at DeGise, the only remaining plaintiff. As previously described, the TRO and proposed injunction were *never* constitutional as they related to the Commissioner-Plaintiffs as they have never alleged harm. However, the Commissioner-Plaintiffs withdrew from this matter, and yet DeGise asserts that the TRO should be converted into a permanent injunction, inclusive of the terms as they relate to the residences of the Commissioners who are not parties

to this case. The TRO in place and the injunction as proposed are wildly overbroad as they relate to these former plaintiffs.

## V. The proposed injunction does not leave open ample alternative channels for communication of Defendants' protected speech.

Any time, place, and manner restrictions on speech must "leave open ample alternative channels for the communication of information." *Perry Educ. Ass'n*, 460 U.S. at 45 (collecting U.S. Supreme Court cases). When examining alternative channels, it is not enough to find that alternatives exist, but the Court must determine whether the alternatives are "satisfactory." *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 93 (1977) (striking down an ordinance prohibiting "for sale" and "sold" signs because while alternative methods like newspaper advertising and leaflets exist to communicate that a house is available, they are a "far from satisfactory" alternative). The Court must consider the practical considerations of alternative channels, including whether alternatives permit protestors to reach the intended audience, and whether protestors can make themselves "seen and heard." *Madsen*, 512 U.S. at 770 (upholding a buffer zone outside a women's health clinic because protesters "can still be seen and heard from the clinic parking lot").[21]

[21] Courts examining whether sufficient alternative channels of communication exist may also consider whether alternative modes are available. *See, e.g., Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (finding the distribution of leaflets to be an acceptable alternative to the posting of signs in public spaces prohibited by ordinance). To the extent Plaintiff

In *Murray*, the Court considered whether picketers would be visible to their intended target when tailoring the distance they must maintain from the plaintiff's residence. 138 N.J. at 232-33. Concluding that if picketers were subjected to a 300-foot restriction, "the picketers and their placards would not likely be visible" from the plaintiff's home or even their yard, the Court reduced the restriction. *Id.* The Court likewise considered protesters' access to their intended audience in *Horizon Health Center*. 135 N.J. at 153 (determining that once modified, "the injunction will not unreasonably inhibit defendants' ability to communicate with their intended audience: defendants will be able to address staff, patients, and visitors").

Here, Defendants sought to direct their opposition to DeGise specifically because he alone had the authority to terminate the contract. (Torres Dep. Tr., 95:1–11; 5T85:6-16; Pl 5, 430:14-20.) Just as prior courts have considered protesters' distance from their intended audience, including the doctor-turned-plaintiff in *Murray* or the individuals seeking clinical care in *Horizon Health*, any alternatives for communication must take into account whether protesters would be visible to DeGise. As DeGise made clear during his testimony, if protestors are demonstrating

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argues that Defendants have alternative modes at their disposal, Defendants direct the Court to *supra* Point I. Given the vagueness of the restraints, law enforcement may interpret the Order to preclude alternative modes of communication, like leafletting – a long-protected method of speech. *See Schenck*, 519 U.S. at 377. Relatedly, the parties cannot be sure whether ample alternatives here exist in part because the TRO does not define the term "protest."

at the corner of Congress Street and New York Avenue, to which the TRO confines their protest, it is impossible for DeGise to see them from his residence. (5T82:8-16.) To see the corner from 402 New York Avenue, he would have to descend the stairs to his house, walk to the public sidewalk, and "develop a si[ght] line." (5T82:17-20.) Similarly, DeGise has acknowledged that he would not be able to hear the protestors from the corner designated for Defendants' protests in the TRO. (DeGise Dep. Tr., Dn 1, 188:12-14.)[22] Because Defendants cannot direct their speech to DeGise from the designated place, the restraints must fail.

Plaintiff has claimed that ample alternatives exist because Defendants are not precluded from speaking at Hudson County Commissioner meetings to express their discontent. This is irrelevant because DeGise – the only person to whom Defendants sought to direct their message – does not attend Commissioners' meetings. (5T84:21-22; Pl 5, 198:3-5.) Plaintiff likewise points to the fact that some Defendants protested in different places in New Jersey since the TRO was put in place to claim that alternative protest locations exist, and that Defendants have not been barred from protesting writ large. This argument fails for the same reason – these protests were not reasonable alternatives because they were not, and could not have been, directed toward DeGise. Plaintiff also claims that Defendants can protest

[22] *See supra* Point IV(B)(i) discussing conflicting testimony from DeGise about his ability to hear protests at the corner of Congress Street and New York Avenue.

outside of the Hudson County Jail, or to Brennan Courthouse, without restrictions. Again, Plaintiff fails to acknowledge that alternative channels of communication must take into consideration the practical reality of whether the intended audience will be able to see or hear the speech.

## VI. Summation and Conclusion

Currently pending before the Court are the Court's Order to Show Cause ("OTSC") why a preliminary injunction should not issue; Defendants' motions to dissolve the TRO and dismiss the complaint; and Plaintiff's request for the Court to issue a permanent injunction following the evidentiary hearing. For all the reasons contained in these papers and in the Opposition Brief, Defendants ask this Court to dissolve the TRO, deny Plaintiff's application for a permanent injunction, and dismiss the complaint in its entirety.[23] Plaintiff's complaint cannot be sustained either as a matter of law, or as a matter of fact, and Defendants ask the Court to dismiss this case, in its entirety. Additionally, even if the Court finds that the Complaint may stand, the evidence admitted at the plenary hearing does not support Plaintiff's request for permanent relief.

[23] Additionally, the unusual procedural posture of this case in which, pursuant to their request, the Court ordered Defendants to contemporaneously file a motion to dismiss with their substantive response to the OTSC, and that this filing follows a plenary hearing on that OTSC, permits the Court to treat the motion to dismiss as one for summary judgment pursuant to *R*. 4:6-2.

**A. Plaintiff's case should be dismissed for failure to state a claim or, alternatively, on summary judgment.**

As Defendants contended in their Opposition Brief, Plaintiffs' Second Amended Complaint fails to state a claim upon which relief can be granted. *See R.* 6:6-2(e). "The essential test is whether a cause of action is suggested by the facts." *Sashihara*, 461 N.J. Super. at 200 (internal quotation marks omitted). The claims in the operative complaint fail even when considering them in the light most favorable to the original plaintiffs who filed it. The complaint alleges that Defendants' conduct was "unlawful," citing allegedly "threatening" and "intimidating," behavior. (*See*, *e.g.*, 2d Am. Compl., ¶¶ 14, 20.) But, as a threshold matter, "[s]peech . . . cannot be transformed into criminal conduct merely because it annoys, disturbs, or arouses contempt." *Burkert*, 231 N.J. at 281. Even if Defendants' behavior was exactly as the complaint characterized it – which it was not – "the First Amendment protects the right to coerce action by 'threats' of vilification or social ostracism." *State v. Carroll*, 456 N.J. Super. 520, 537 (App. Div. 2018) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 926) (discussing the protected status of offensive language under the First Amendment). Furthermore, Plaintiff is not entitled to injunctive relief that violates the Constitution. Even assuming for the purposes of this motion that he holds no animus towards Defendants' viewpoints and that the Amended Complaint merely sought a content-neutral restriction on speech, as described *supra*, the current and proposed

restrictions on speech burden far more speech than necessary to serve the limited government interest. *Madsen*, 512 U.S. at 765. Plaintiffs have not and cannot allege facts that support their request for such a broad injunction. For these reasons, and for all the foregoing reasons set out *supra* in Points I-IV, the Complaint should be dismissed.

Should the Court convert Defendants' motion to dismiss to a motion for summary judgment, *see R.* 4:6-2, for all the reasons previously elucidated, Defendants are entitled to a judgment in their favor as a matter of law. As laid out in Points I-IV, the current restrictions and proposed permanent injunction are unconstitutional on their face and violate Defendants' First Amendment rights in application.

**B. Plaintiff has failed to show that a permanent injunction is the appropriate remedy.**

Plaintiff's claim that he faces irreparable harm absent an injunction reflects only his wish to avoid exposure to unwanted speech on a public street outside his home, where Defendants have observed local ordinances when informed of any transgressions, have not attempted contact with his family, and have not intruded on his private property. This is not the kind of "severe personal inconvenience" that courts have found may justify injunctive relief. *Cf. Crowe*, 90 N.J. at 176 (observing that "the trauma of eviction from one's home" and the loss of one's only source of financial support "may well justify the intervention of equity").

DeGise argues that "[t]he irreparable harm here is manifest," pointing to Defendants' use of noise-amplification devices, flashlights, "ominous[24] written messages located directly in front of Plaintiff's residence," "all done during an extremely late hour of the evening." (Pl.'s Sept. Br., at 24.) First, as described *supra*, Plaintiff DeGise's characterization of what happened during the protests, vigils, and leafletting outside his residence is inconsistent with others' recollections. (*Compare*, *e.g.*, 8T50:20-24 (testimony of Sheriff Schillari about reports from his officers), Dn82A (describing the protesters as "peaceful" in dispatch comment sheet), Dn43, *and* Dn69 (Lt. Rodriguez reporting that officers outside the residence stated that the protesters were "peaceful"), *with* 8T61:24-62:12 (DeGise reporting that protesters were not under control); *see also* 8T124:21-125:5 (testimony that only one person shone a light into the DeGise residence, and they immediately stopped when told to), 98:18-24 (describing the lights like replicas of candles); Krywinski Certification ¶ 10 (noting that he "observed some lighting/ lanterns that were placed on the sidewalk in front of the residence," without writing that he saw a flashlight or that anything was shone into the DeGise residence).) More importantly, however, what Plaintiff claims as irreparable harm reflects legislative choices made by local government as to how and when people can gather on a public street in Jersey City.

[24] Defendants are not aware of any written messages that were "ominous," and Plaintiff provides no record citation.

It is uncontroverted that, in an effort to comply with local ordinances, after December 3, any noisemaking by Defendants was limited to less than an hour each day and occurred during a time that Jersey City permitted higher decibel volume. (Stip. Facts, ¶¶ 26-27; 8T126:4-13; Gregg Dep. Tr., 30:25-31:8, 47:11-12; Dn83.)

Additionally, had Plaintiff been concerned that the decibel level violated local ordinances, he had several options available to him. For instance, he could have spoken with the protesters, as he had with the firefighters who protested outside of his residence years earlier. (DeGise Dep. Tr., Dn 1, 93:9-11.) DeGise was in constant contact with law enforcement (*see*, *e.g.*, 8T65:4-7 ("Q: Sheriff Schillari, during this time you were getting a lot of calls from Mr. DeGise, is that right? A: At least once a night, sometimes twice.")). He could therefore have asked them to instruct Defendants to abide by the municipal noise ordinance or otherwise change their behavior, as officers did with the use of flashlights (8T124:21-125:5 (testimony by Sergeant Flannelly that the one person flashing a light into the DeGise residence "immediately complied" when told to stop)). DeGise could have requested that HRHC share the noise readings with local law enforcement and request officers to enforce the existing ordinance, as he asked for them to enforce the TRO on December 8 (DeGise. Dep. Tr., Dn 1, 102:8-14 (noting that the County Executive "signed off" on the arrests)). Instead, Plaintiff opted to ask this Court to issue an overbroad, vague, and unnecessary injunction, burdening far more speech than

necessary, *see Madsen*, 512 U.S. at 765, and criminalizing activity that is otherwise permissible, resulting in the arrest of four Defendants on a day that Plaintiff concedes there was no protest (*see* Pls.' Br. in Supp. of Mot. For Recons., at 4, May 10, 2021 ("[N]o protest occurred on December 8th.")).[25]

Furthermore, Plaintiff's assertions of continuing harm are, at best, speculative. As explained *supra*, Hudson County recently announced that it will no longer be detaining people for ICE. Plaintiff signed a letter to ICE to this effect, meaning that he has now taken the action Defendants sought in their protests and vigils. *See* Anello Decl., Ex. 1. Contrary to Plaintiff's assertions (*see* Pl.'s Sept. Br. at 21-22), the originally-named Defendants' deposition testimony provides no evidence of continuing harm to DeGise. The cited testimony responded to questions posed over the objection of counsel and months before DeGise would accede to their policy plea,[26] about whether they might protest on some indeterminate future date, without any clarity as to proposed restrictions or geographic location.[27] *Cf. Verna v. Links at*

[25] It is for these same reasons that Defendants oppose Plaintiff's proposition to "bar the use of sound amplifying devices" in a proposed permanent injunction. (Pl.'s Sept. Br., at 4 n.2.) There is no need for a targeted injunction when neutral rules have already set the decibel levels allowed in DeGise's neighborhood. DeGise is not entitled to a separate set of rules in the form of an injunction.

[26] Defendants maintain that the questions asked by Plaintiff's counsel were speculative and thus objectionable, and that the answers elicited do not constitute admissible evidence.

[27] *See*, *e.g.*, Gregg Dep. Tr., 131:16-18 (Q: So if a protest was planned, you would go? A: I'm speculating, I don't know); Torres Dep. Tr., 74:3-75:22 (consistent

*Valleybrook Neighborhood Ass'n, Inc.*, 371 N.J. Super. 77, 90 (App. Div. 2004) ("[T]he injunction should not have issued because of the absence of proof that plaintiff was continuing to violate the regulation[.]")

Moreover, a balancing of the equities, which requires a court to consider the "relative hardship[s] to the parties," also favors the Defendants. *Crowe*, 90 N.J. at 134; *see also Bubis v. Kassin*, 353 N.J. Super. 415, 424 (App. Div. 2002) ("[T]he trial court correctly concluded that it was required to consider the relative hardships to the parties as well as other equitable circumstances in determining whether to grant equitable relief[.]"). In cases where "the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant." *Waste Mgmt. of N.J., Inc. v. Union Cnty. Util. Auth.*, 399 N.J. Super. 508, 520 (App. Div. 2008). Defendants' First Amendment freedoms at issue are exactly the sort of rights that significantly implicate the public interest, and courts weigh

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testimony that Ms. Torres does not know whether she would protest outside of the DeGise residence should the TRO be lifted), 97:19-24, 98:16-24 ("Q: Since the TRO, has there been any communication with protesting at the County Commissioners at any other type of events or at any other time? . . . [Objection] A: There has been discussion about how to keep the issue visible and in public conversation and there was discussion about testifying at County Commissioner hearings and continuing an effort to show up there until County Commissioners voted to restrict public comment." . . . Q: How about if the County Executive has a fundraising event at some point in the next five or six months, would you show up there and protest? [Objection] A: I'm not sure. I think it warrants discussion because at this point many people have felt like their personal safety may be at risk for doing any sort of protest in Hudson County."); Budnick Dep. Tr., 54:1-55:6.

them heavily when deciding whether to issue relief. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). That consideration is of paramount importance when the Court, and not the Legislature, is considering extending and making permanent—with no proposed end date or conditions for abatement—restrictions on the First Amendment right to speak, protest, and leaflet for the named Defendants and any other member of the public who may wish to join them. For all the reasons contained herein, the current burden on Defendants' protected speech imposes a severe hardship that outweighs Plaintiff DeGise's interest in residential privacy, and the Court should decline to make those restrictions permanent.

* * *

Based on the foregoing, Defendants respectfully request that the Court dismiss Plaintiff's case in its entirety for failure to state a claim or, in the alternative, grant summary judgment for Defendants. Moreover, the Court should deny Plaintiff's request for permanent injunctive relief and immediately dissolve the Temporary Restraining Order filed on December 8, 2020.

Dated: October 1, 2021

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